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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

YACUB AVICENNA MCCLENDON,

Defendant and Appellant.

F054975

(Super. Ct. No. MCR015203)
Madera County

ORDER

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Janis Shank McLean, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Wiseman, Acting P.J., Levy, J. and Hill, J.

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A jury convicted Yacub Avicenna McClendon of second degree murder (Pen. Code¹ § 187; count 1), assault with a semiautomatic weapon (§ 245, subd. (b); counts 2, 4, 5 & 6) and possession of firearm by convicted felon (§ 12021, subd. (a)(1); count 13). The jury found enhancements for personal and intentional use of a firearm to be true on counts 1, 2, 4, 5 and 6.

The court sentenced appellant to an indeterminate term of 15 years to life on count 1, plus 25 years to life for the gun enhancement under section 12022.53, subdivision (d). On count 4, the principal determinate term, appellant was sentenced to nine years, plus a consecutive term of 10 years pursuant to section 12022.5, subdivision (a). On each of counts 5 and 6, appellant was given two years with an enhancement under section 12022.5, subdivision (a), for a consecutive term of three years four months. The sentence on count 2 was stayed. The sentence on count 13 was made concurrent. Appellant was awarded 1,994 days of custody credit.

On appeal, appellant contends the section 12022.53, subdivision (d), enhancement to count 1 violates the multiple punishment bar of section 654. He also contends an erroneous “true” finding on enhancements under section 12022.53, subdivision (b), must be reversed because the enhancements were not charged in the information; and do not apply to counts 4, 5 and 6. We will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The sentencing issues in this appeal require only a brief summary of the facts. On December 8, 2002, appellant and an unidentified accomplice went to a house in Madera allegedly to buy marijuana. David Ybarra came outside to speak to them. Appellant

¹ All further statutory references are to the Penal Code unless otherwise indicated.

pulled a nine-millimeter semiautomatic gun on Ybarra. He and his accomplice went through Ybarra's pockets and took his wallet.

Appellant entered the house, holding the gun and covering his face with some clothing. He entered the living room where Ernest Reyes, Manuel Martinez, and Daniel Lopez were playing video games. Ricardo Lopez was brought into the living room. Appellant was waving his gun at the men as he asked, "Where's the weed at?"

Appellant was startled when the back door suddenly slammed shut. When he turned to investigate the noise, Ricardo Lopez and Manuel Martinez ran to the bathroom where they kept a gun. Appellant chased them down the hall. The bathroom door was partially open. Appellant reached into the bathroom and fired. Ricardo Lopez was instantly killed by a gunshot through the forehead. Appellant fired another shot through the bathroom door. Martinez returned fire through the bathroom door, striking appellant in the hip. Appellant fled the scene.

DISCUSSION

I. Enhancement under section 12022.53, subdivision (d), on count 1

Appellant contends the enhancement of 25 years to life imposed on count 1, pursuant to section 12022.53, subdivision (d), constitutes multiple punishment and is prohibited by section 654. He submits the California Supreme Court misapplied United States Supreme Court precedent. Appellant raises the issue to preserve it for federal review.

Multiple punishments for the same act or omission are prohibited. (§ 654.) Section 654 states, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Id.*, subd. (a).)

Section 12022.53, subdivision (d), provides, "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) ...

personally and intentionally discharges a firearm and proximately causes great bodily injury ... or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” Murder is a qualifying felony under section 12022.53, subdivision (a)(1).

The Supreme Court held that section 12022.53 enhancements are not subject to the multiple punishment provision of section 654. (*People v. Palacios* (2007) 41 Cal.4th 720, 727-728 (*Palacios*).) Enhancements are not elements of the offense for purposes of the rule prohibiting multiple convictions based on lesser included offenses. (*People v. Sloan* (2007) 42 Cal.4th 110, 123 (*Sloan*); accord, *People v. Izaguirre* (2007) 42 Cal.4th 126, 132-134 (*Izaguirre*).) Firearm related enhancements do not place a defendant in jeopardy for an “‘offense’” greater than the murder with which he was charged. (*Izaguirre, supra*, at p. 134.) The language in section 12022.53, subdivision (d), providing for a 25-year-to-life enhancement, “‘notwithstanding any other provision of law’” demonstrates legislative intent to remove the enhancement from multiple punishment provisions of section 654. (*Palacios, supra*, at p. 728.)

Appellant contends that these decisions are flawed and misapply United States Supreme Court precedent. However, as he concedes, this court is bound by *Sloan*, *Izaguirre* and *Palacios*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we reject appellant’s contention.

II. Erroneous enhancement findings under section 12022.53 for counts 4, 5 and 6

Appellant contends the enhancement findings under section 12022.53, subdivision (b), on counts 4, 5 and 6 must be reversed because those enhancements were not and could not be charged.

As to counts 4, 5 and 6, the verdict included a “true” finding on an erroneous enhancement. Section 12022.53, subdivision (b), applies to specific felonies of which

section 245, subdivision (b), is not included. The error, however, was harmless because it was caught and corrected before sentencing.

The information properly charged appellant with only a section 12022.5, subdivision (a), enhancement for counts 4, 5 and 6. The jury, however, was provided a preprinted verdict form that included a section 12022.53 enhancement, as well as the proper enhancement for personally using a firearm. The jury completed the form with a “true” finding for sections 12022.53, subdivision (b), and 12022.5, subdivision (a), enhancements.

The error, however, was caught before sentencing. The error is not on the abstract of judgment and appellant was not sentenced for the erroneous enhancements. The probation report states, “Regarding the enhancement per PC 12022.53(b) which the jury found true for counts 4, 5 and 6, violations of PC 245(b), section 12022.53 is applicable to specified felonies and section 245(b) is not one of the offenses listed by statute. As the offenses in counts 4, 5 and 6 is not one of the offenses listed in the statute there is no factual basis for imposing the enhancement pursuant to PC 12022.53(b).”

“‘A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.’ [Citations.]” (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256.) “The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]” (*Ibid.*) Section 1404 states, “Neither a departure from the form ... nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.” We “must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.” (§ 1258.)

The jury intended to indicate with the “true” finding that appellant personally used a firearm while committing the offense. The error as to the enhancement under section 12022.53, subdivision (b), was inadvertent and harmless. The error was corrected, as

stated in the probation report, before sentencing and is not on the abstract of judgment. Appellant's substantial rights were not affected by the erroneous jury verdict form and the verdict on these enhancements does not need to be reversed.

DISPOSITION

The judgment is affirmed.